To amend title XVIII of the Social Security Act to encourage Medicare beneficiaries to voluntarily adopt advance directives guiding the medical care they receive.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Medicare Choices Empowerment and Protection Act”.
SEC. 2. MEDICARE ADVANCE DIRECTIVE CERTIFICATION PROGRAM.

Part B of title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.) is amended by adding at the end the following new section:

"MEDICARE ADVANCE DIRECTIVE CERTIFICATION PROGRAM

"Sec. 1849. (a) In General.—

"(1) Establishment of Program.—The Secretary shall establish and implement an Advance Directive Certification Program (in this section referred to as the ‘Program’) under which the Secretary shall encourage eligible beneficiaries to adopt and maintain certified advance directives to guide the delivery of health care to such beneficiaries. The Secretary shall implement the Program not later than 3 years after the date of enactment of this section.

"(2) Definitions.—In this section:

"(A) Certified advance directive.—The term ‘certified advance directive’ means any electronically stored statement by an eligible beneficiary who—

"(i) provides instructions that outline the kind of medical treatments and care that such beneficiary would want or not
want under particular conditions, and may also include the identification of a health care proxy or legal representative to make medical treatment decisions for the beneficiary if the beneficiary becomes unable to make or communicate those decisions;

“(ii) is executed in accordance with the law governing advance directives of the State involved; and

“(iii) is offered by an entity that has received accreditation from the Secretary under this section.

“(B) ELIGIBLE BENEFICIARY.—The term ‘eligible beneficiary’ means an individual enrolled under this part.

“(3) VOLUNTARY.—Participation in the Program shall be voluntary with respect to the eligible beneficiary and an eligible beneficiary who has registered a certified advance directive under the Program may terminate such directive at any time. Nothing in this section shall require an eligible beneficiary to adopt or maintain a certified advance directive.

“(4) BEST PRACTICES.—In establishing and implementing the Program, the Secretary shall con-
consider best practices within existing advance directive registry technologies, programs, and systems, including web-based or cloud-based advance directive technologies, which may utilize time and date stamps, video, or other innovative measures to protect the authenticity, improve the quality, and enhance the security of such directives.

“(5) Enrollment and disenrollment.—The Secretary shall establish procedures for eligible beneficiaries to enroll and disenroll under the Program. Such procedures shall ensure that enrollment and disenrollment is available through an online process. The Secretary shall also establish procedures to ensure Program participants can update or amend an advance directive in a timely and secure manner.

“(6) State law.—This section shall in no way supercede, abrogate, or otherwise interfere with State law governing advance directives. Under the Program, the Secretary shall establish a process under which the Secretary is required to verify that digital advance directive vendors or other entities providing a digital advance directive participating in the program enable those using their services to complete advance directives that fully comply with
the law governing advance directives of the State involved.

“(7) **Display of statutory and alternative advance directive forms.**—Under the Program, the Centers for Medicare & Medicaid Services shall provide, through a clearinghouse website, links to statutory and alternative advance directive forms and a State-by-State index to such forms to allow a beneficiary to create, adopt, modify, and terminate an advance directive with any content permitted or required, and in any form authorized by a State, in accordance with the requirements of subparagraphs (C) through (E) of subsection (e)(1) and subsection (e)(2).

“(8) **Access in cases of dispute over treatment.**—Under the Program:

“(A) **Special access.**—The Secretary shall establish a process whereby, with respect to a beneficiary with a certified advance directive, a person described in subparagraph (B) may obtain access to the beneficiary’s advance directive for the purposes of viewing and sharing such advance directive when—

“(i) the provisions of the advance directive have come into force under the ap-
applicable State’s law because the beneficiary has become incapable of making health care decisions or under other circumstances provided under State law; and

“(ii) at least one person described in subparagraph (B) is questioning or disputing the provision, withholding, or withdrawal of medical treatment, food, or fluids with respect to the beneficiary.

“(B) INTERESTED INDIVIDUALS.—A person described in this subparagraph, with respect to a beneficiary, is—

“(i) any individual who is a member of any class of persons who, under the applicable State’s law, would potentially be eligible to serve as a health care decision maker for the beneficiary if an advance directive had not been executed regardless of whether higher priority for such eligibility would be accorded to another individual or individuals; and

“(ii) if the applicable State’s law does not designate persons or classes of persons described in clause (i), any person related
within the third degree of consanguinity or affinity to the beneficiary.

“(b) Registration.—

“(1) In general.—The Secretary shall establish procedures for an eligible beneficiary to register such beneficiary’s adoption of a certified advance directive under the Program. Such procedures shall ensure that registration is available through an online process. The Secretary shall also establish procedures to ensure Program participants can update previously registered information that is no longer accurate and indicate that an advance directive has been terminated.

“(2) Required information.—In addition to such other information as the Secretary may deem appropriate, an eligible beneficiary seeking to register a certified advance directive under the Program shall indicate where the advance directive is maintained.

“(3) Registration periods.—The procedures established under paragraph (1) shall provide that registration under the Program shall occur during—

“(A) an eligible beneficiary’s initial enrollment under an MA plan under part C as de-
scribed in paragraph (1) of section 1851(e); and

“(B) the annual, coordinated election period under paragraph (3) of such section.

“(4) PRIVACY AND SECURITY.—

“(A) IN GENERAL.—The Secretary shall ensure that all aspects of the registration system comply with the Federal regulations (concerning the privacy of individually identifiable health information) promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 subject to the access authorized under subsection (a)(8) and subsection (c)(2)(D).

“(B) ACCESS.—The Secretary shall utilize standardized data protections and privacy standards, including the Federal regulations described in paragraph (1), to ensure that the registration record of an eligible beneficiary can only be accessed by—

“(i) the beneficiary, through the process established under paragraph (1);

“(ii) those authorized to access the advance directive under subsection (a)(8) and subsection (c)(2)(D); and
“(iii) providers of services and suppliers participating under this title, through a process established by the Secretary.

“(c) ACCREdITATION.—

“(1) IN GENERAL.—Under the Program, the Secretary shall—

“(A) grant accreditation to advance directive vendors and other entities providing advance directives that meet the accreditation criteria established under paragraph (2); and

“(B) establish a process whereby advance directive vendors and other entities providing advance directives may obtain accreditation under this subsection.

“(2) ACCREdITATION CRITERIA.—The Secretary, in consultation with the General Accounting Office, shall establish accreditation criteria for advance directive vendors and other entities providing advance directives that seek to offer advance directives to be certified under the Program. Such criteria shall consist of the following:

“(A) PROCESS FOR ADOPTING ADVANCE DIRECTIVE.—The advance directive vendor or other entity providing an advance directive shall
allow a beneficiary to create, adopt, modify, and
terminate an advance directive through an on-
line process.

“(B) VENDORS.—The advance directive vendor or other entity providing an advance di-
rective shall comply with an annual quality re-
view to be conducted by the Secretary.

“(C) USE OF STATUTORY AND ALTERNATIVE ADVANCE DIRECTIVE FORMS.—The ad-
vance directive vendor or other entity providing an advance directive shall enable a beneficiary to access, complete, modify, and adopt any ad-
vance directive applicable to the State indicated by the beneficiary who is posted as provided under subparagraphs (C) through (E) of sub-
section (e)(1) and of subsection (e)(2).

“(D) ACCESS.—The advance directive ven-
dor or other entity providing an advance direc-
tive shall maintain advance directives in such a way that—

“(i) an eligible beneficiary who has
adopted an advance directive with such
vendor or entity and any family member,
legal representative, or health care proxy
legally designated by such beneficiary has
direct, near real-time online access to the beneficiary’s advance directive for purposes of viewing and sharing such advance directive;

“(ii) in the case of an eligible beneficiary who has adopted an advance directive with such vendor or entity or any family member, legal representative, or health care proxy legally designated by such beneficiary who is unable or unwilling to use the online access under subparagraph (A), such individual is able to obtain a hard copy of the beneficiary’s advance directive for the purposes of viewing and sharing such advance directive; and

“(iii) providers of services and suppliers participating under this title have near real-time online access to the advance directive of an eligible beneficiary who has adopted an advance directive with such vendor or entity.

“(E) PRIVACY PROTECTIONS.—

“(i) IN GENERAL.—The advance directive vendor or other entity providing an advance directive shall comply with the
Federal regulations (concerning the privacy of individually identifiable health information) promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note), subject to the access authorized under subparagraph (D) and subsection (a)(8).

“(ii) ACCESS.—Such vendor or entity shall utilize standardized data protections and privacy standards, including the Federal regulations described in clause (i), to ensure that the content of an eligible beneficiary’s advance directive is owned and maintained by the beneficiary and can only be accessed by those authorized to access the advance directive under subparagraph (D) and subsection (a)(8).

“(F) SECURITY AND TESTING.—The advance directive vendor or other entity providing an advance directive shall certify that—

“(i) all data management and data transfer elements involved in adopting, maintaining, and accessing the advance directive have successfully passed rigorous
independent testing regarding standards of
timeliness, accuracy, and efficiency;

“(ii) the data management and data
transfer elements involved in adopting,
maintaining, and accessing the advance di-
rective meet widely accepted industry secu-

rity standards; and

“(iii) the system that provides access
to the advance directive has passed real-
time tests simulating a realistic volume of
beneficiaries and providers accessing ad-
vance directives simultaneously.

“(G) CERTIFIED ADVANCE DIRECTIVES.—
The advance directive vendor or other entity
providing an advance directive shall agree to
offer certified advance directives (as defined in
subsection (a)(2)(A)).

“(H) BENEFICIARY SURVEYS.—

“(i) IN GENERAL.—The advance di-
rective vendor or other entity providing an
advance directive shall agree to administer
annual beneficiary surveys on the informa-
tion described in clause (ii) and submit the
results of such surveys to the Centers for
Medicare & Medicaid Services.
(ii) INFORMATION.—The information described in this clause, with respect to an annual beneficiary survey and certified advance directive of a beneficiary, is the following:

“(I) Whether the beneficiary had to pay any third party for the creation, storage, or retrieval of the certified advance directive.

“(II) Whether the beneficiary had a health care encounter or emergency that required the location, access, retrieval, or consultation of the certified advance directive and if so, whether the certified advance directive was accessible in online and in near real-time, as required under this section.

“(III) Whether the certified advance directive was actionable.

“(IV) Whether medical personnel followed the certified advance directive.

(d) INCENTIVE.—
“(1) IN GENERAL.—The Secretary shall make a one-time payment of the amount specified in paragraph (2) to each eligible beneficiary who adopts a certified advance directive and registers such directive with the Program.

“(2) AMOUNT.—

“(A) IN GENERAL.—For purposes of paragraph (1), the amount specified in this paragraph is—

“(i) for a beneficiary who registers a certified advance directive with the Program in 2015, $75; or

“(ii) for a beneficiary who registers a certified advance directive with the Program in a subsequent year, the amount specified in this paragraph for the preceding year increased by the percentage increase in the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor) over the preceding year.

“(B) ROUNDING.—If any amount determined under subparagraph (A) is not a multiple
of 10 cents, such amount shall be rounded to the nearest multiple of 10 cents.

“(3) ADMINISTRATION.—The Secretary shall, through a full notice and comment rulemaking process, establish procedures for—

“(A) making the incentive payment directly to the eligible beneficiary or a personal account maintained by the beneficiary at a financial institution that has been designated by the beneficiary, and ensuring that no other entity receives the payment on the beneficiary’s behalf; and

“(B) ensuring that a beneficiary does not receive an incentive payment under this section more than once.

“(e) EDUCATION AND OUTREACH.—

“(1) IN GENERAL.—The Secretary shall provide for—

“(A) the inclusion of the statement set forth in paragraph (3) in the Medicare and You handbook under section 1804 and on a clearinghouse website linked to the Internet website of the Centers for Medicare & Medicaid Services;
“(B) the promotion of the benefits of electronic advance directives services, as they become available, through the use of mass communications and other means;

“(C) the inclusion, under the heading ‘Statutory Advance Directive Forms’, of any relevant forms, whether mandatory or optional, specified in the statues or regulations of the States to be displayed on a clearinghouse website;

“(D) the inclusion, under the heading ‘Alternative Advance Directive Forms,’ on a separate clearinghouse website, and in accordance with paragraph (2)—

“(i) of other advance directive forms submitted to the Secretary by individuals and groups in an electronic format specified by the Secretary for which the submitting entity includes, for each form submitted, an opinion by an attorney licensed to practice in the relevant State demonstrating that the submitted form complies with the law of that State; and

“(ii) of the following disclaimer, which shall be prominently posted on the website:
'This website includes for your consideration alternative advance directive forms submitted by individuals or groups reflecting different perspectives on advance health care decisions which you may wish to review before completing your own advance directive.'; and

“(E) the inclusion of a user friendly index on the clearinghouse website by State and, in the case of the ‘Alternative Advance Directive Forms’, by the name of the provider, so that a user may readily access those statutory and alternative forms.

“(2) ALTERNATIVE ADVANCE DIRECTIVE FORMS.—

“(A) IN GENERAL.—For purposes of paragraph (1)(D), the following shall apply:

“(i) Not later than 60 days after receiving an advance directive form submitted under such paragraph, the Secretary shall either post the submitted form on a clearinghouse website or provide to the submitting entity a detailed explanation of the basis for the Secretary’s determination that the submitted form does
not comply with relevant State or Federal law, which determination shall be subject to judicial review under section 702 of title 5 of the United States Code; and

“(ii) the Secretary shall either remove or refuse to post any submitted form if provided with an official determination by the Attorney General of the applicable State that the form is not in compliance with State law, subject to applicable State law described in subparagraph (B).

“(B) STATE LAW DESCRIBED.—For purposes of subparagraph (A), State law described in this subparagraph is—

“(i) a ruling by a court of the applicable State, or by a Federal court applying that State’s law, subject to subsequent rulings by a court or courts with authority to supercede that ruling; or

“(ii) a statute or regulation of the applicable State that provides for a specific procedure for officially determining whether particular advance directive forms comply with State law.
“(3) STATEMENT.—For purposes of paragraph
(1)(A), the statement included in this paragraph is
the following statement, with appropriate insertions
in the bracketed segments updated at least annually:

“WHY YOU MAY WANT TO CONSIDER AN ‘AD-
VANCE DIRECTIVE’ Do you ever worry what would
happen if you became unable to make health care decisions
for yourself because of an illness or injury? That’s what
an ‘advance directive’ is for. You can use it to give direc-
tions for your health care providers and family about your
health care wishes that are to be followed if you are no
longer able to speak for yourself. You can also name some-
one you trust, like a family member or friend, to give
health care directions for you when you can’t do so your-
self.

“You should consider carefully who to choose to
speak for you and what directions you want to give to en-
sure your representative clearly reflects your own values
and treatment preferences. You should not feel pressured
to violate your own values and preferences, and you are
entitled to implement them without discrimination based
on age or degree of disability.

“There are many resources to help you.

“By choosing the name of a state at [INSERT name
of webpage for the index provided in paragraph 4 of this
subsection and its URL (and, on the clearinghouse website, include a hyperlink to it)], you can find sample advance directives for that state. You can see any sample or required forms given in state law, as well as others from individuals or groups with different viewpoints on advance health care decisions which you may wish to review before completing your own advance directive.

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" Below is contact information for accredited vendors who will arrange for your advance directive to be confidentially kept online, where it can be seen by doctors who are treating you so they are made aware of your wishes. You can also give permission to certain other people, like family members or friends, you want to be able to get a copy of your advance directive. If a disagreement about your treatment develops, depending on your state’s law certain other people may also be allowed to see it.

" These vendors can also help you create an advance directive online or with paper documents, if you wish. Online directives allow you to change or cancel one that no longer fits with your wishes in a more timely manner.

"[INSERT, in alphabetical order, the names and contact information for currently accredited advance directive vendors (and, on the clearinghouse website, hyperlinks to their websites).]
“Although any adult who is capable of doing so can use these resources to complete an advance directive at any time, Medicare beneficiaries are particularly encouraged to do so when enrolling in Medicare or during the annual enrollment period when you can choose among different Medicare health insurance alternatives.

“In addition, some Medicare Advantage plans or supplemental insurance plans may offer a financial incentive or other additional benefits for creating an advance directive online.

“By completing an advance directive you can not only make it more likely that your wishes about health care will be known if you are unable to tell them at the time, but also spare family, friends, and doctors the difficulty of trying to figure out what you would have wanted. These are matters of the highest importance that can affect life-or-death decisions, as well as your future comfort and well-being. You are encouraged to think about them carefully, and give serious consideration to recording your wishes in an advance directive.”.